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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 664

WESTERN FRUIT GROWERS SALES CO., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 322 F. 2d 67. The decision and order of the Federal Trade Commission (Pet. App. 7-8) and the hearing examiner's initial decision (Pet. App. 9-21) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1963, and a petition for rehearing was

denied on September 27, 1963. The petition for certiorari was filed December 7, 1963. The jurisdiction of this Court is invoked under 15 U.S.C. 21(c) and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission's decision that petitioner had made brokerage payments to buyers of goods in violation of Section 2(c) of the Robinson-Patman Act was supported by adequate findings and evidence that the recipients of the brokerage payments were the actual purchasers from petitioner.

2. Whether the Commission's cease-and-desist order against petitioner was within the scope of its authority to prescribe relief against violations of the Act.

STATUTE INVOLVED

Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative or other intermediary therein where such intermediary is acting in fact for or in behalf, or is

> subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Section 11(b) of the Clayton Act, as amended, 15 U.S.C. (Supp. IV) 21(b), authorizes the Federal Trade Commission to enforce compliance with Section 2 of the Act and provides that if the Commission has reason to believe that any person is violating or has violated any of its provisions, it shall issue a complaint, and give notice of a hearing thereon. It further provides:

> If upon such hearing the Commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations * * * in the manner and within the time fixed by said order. * * *

STATEMENT

Petitioner, a California corporation, is engaged in the business of packing, selling and distributing citrus and other fruits. It receives fruits from some 22 packing houses in California and Arizona, for which it acts as a consignment shipper. Petitioner sells through brokers to wholesalers, jobbers and commission merchants, as well as direct to customers in many sections of the United States (Pet. App. 1-2). When such brokerage was performed, the petitioner's brokers located customers and arranged sales, and

petitioner billed the customers, and received remittances from them.

This case involves transactions in which it was alleged that petitioner made direct sales to firms which in other and generally unrelated situations acted as brokers for petitioner; and that it paid brokerage fees to such buyers. A number of these transactions, concededly typical and representative of a larger number, were fully developed in the record (Pet. App. 2, 7, 15).

The Commission adopted the examiner's findings that the representative transactions were sales made to the broker-buyers, that brokerage was paid on such sales to the buyers and that the petitioner had thereby violated Section 2(c) of the Robinson-Patman Act (Pet. App. 7).[1]

The facts upon which the Commission concluded that the transactions were sales to the recipients of the brokerage payments are substantially undisputed. Petitioner admitted that it sold the goods to the recipients of the brokerage in their own names (Pet. App. 9, 13); that it billed and invoiced the broker-buyer and looked only to him for the purchase price; that it shipped and delivered the goods to the broker-buyer and did not control their resales, or know in advance their resale prices or customers; that it considered the transactions completed when it shipped the goods and billed the broker-buyers; and

[1] The Commission did not rely on and rejected findings made by the hearing examiner relating to volume discounts granted to large direct buyers by respondent. (Pet. App. 3 n. 3, 7, 19-21).

that upon shipment the broker-buyers exercised complete control over the goods, without in any way accounting for the resale of the goods. (Pet. App. 3-4, 9, 13, 16).[2]

As relief against the violations found, the Commission adopted the examiner's proposed order (Pet. App. 21) which prohibits petitioner from:

> Paying, granting, or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of, such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of citrus fruit or any other food products, to such buyer for his own account.

The Court of Appeals for the Ninth Circuit affirmed. It held that there was substantial evidence to support the Commission's conclusion that a buyer-seller relationship existed between petitioner and the

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[2] Petitioner in its answer to the complaint and at the hearing admitted that the transactions were treated by it as sales to the broker-buyers, but contended that in the representative transactions the broker-buyers were agents for their customers rather than purchasers on their own accounts, and that the brokerage fees and commissions were allowed to them for services in the capacity of agents for the buyers (Pet. App. 13, R. 9, 51, Tr. 13). As noted in the initial decision, it was pointed out that this was an admission that Section 2(c) had been violated, since it prohibits such payments by the seller to the buyers' agents as well as to buyers (Pet. App. 19). Thereafter, petitioner abandoned its contention that the broker-buyers were acting as agents for their buyers and argued the transactions were not sales.

recipients of the brokerage payments (Pet. App. 3-4). The court sustained the scope of the cease-and-desist order against the claim that it was too broad: the order "does no more than prohibit the practices found to exist in this case and closely related acts, all of which are expressly prohibited by section 2(c)" (Pet. App. 4-6).

ARGUMENT

The court of appeals properly sustained the Commission's finding that petitioner had violated Section 2(c) of the Robinson-Patman Act, and upheld the terms of the Commission's cease and desist order. No further review of these primarily factual issues is warranted.

1. Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act is violated by a seller's payments of brokerage upon the sale of goods "to the other party to such transaction," *i.e.*, the buyer. *Federal Trade Commission* v. *Broch & Co.*, 363 U.S. 166, 169; H. Conf. Rep. No. 2951, 74th Cong. 2d Sess. p. 7. In this case, it is conceded that the petitioner invoiced goods and made brokerage payments to the same persons. The contention is, however, that the recipients of the goods were only brokers, not the actual buyers, and that the goods were invoiced to them as a matter of convenience, solely to avoid billing the many ultimate customers. But the record shows that the alleged "brokers" exercised dominion over the goods as purchasers. The facts set forth *supra*, pp. 4-5, clearly support the Commission's finding that these transactions were

sales and that the petitioner and the recipients of the brokerage payments were in the relation of seller-and-buyers.

Petitioner contends that a violation could not be found since it did not have knowledge that the "brokers" were purchasers for their own accounts (Pet. 10), and, in particular, that it did not have knowledge of the "broker's" resale prices which differed from petitioner's price (Pet. 6, 10, 13, 14). However, petitioner was aware that it sold the goods to the "brokers" in their own names, that it gave the "brokers" complete control of the goods with authority to fix their own resale prices and that it never sought any accounting from the "brokers" with respect to resales. Petitioner cannot complain that the Commission and the court properly concluded from these facts that sales were made to the alleged "brokers."

In any event, the petitioner's knowledge of the level of such later resale prices is not an element of a Section 2(c) violation. The violation took place before resale, when there was a sale by petitioner accompanied by the admitted brokerage payment to the broker-buyer.[3]

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[3] See *Federal Trade Comission* v. *Broch & Co.*, 363 U.S. 166, 168-171; *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 63; *Webb-Crawford Co.* v. *Federal Trade Commission*, 109 F. 2d 268, 269 (C.A. 5); *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission*, 106 F. 2d 667, 673, 674 (C.A. 3); *Oliver Bros., Inc.* v. *Federal Trade Commission*, 102 F. 2d 763, 769 (C.A. 4); *Southgate Brokerage Co., Inc.* v. *Federal Trade Commission*, 150 F. 2d 607, 609 (C.A. 4); *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393, 398-399 (C.A. 1); *Biddle Purchasing*

Similarly, the Commission's decision is not deficient as petitioner contends (Pet. 16), because it does not expressly negative the assertion that petitioner intended the transactions not be sales. It was sufficient for the Commission to find that sales had been made to the alleged brokers, regardless of petitioner's asserted intent. In any event, as the court noted, the finding of a buyer-seller relationship (Pet. App. 13) is demonstrably based upon the understanding of the transaction by petitioner as well as by the alleged "brokers" (Pet. App. 3-4). The finding that the petitioner's conceded conduct constituted all the essential elements of a sale is in fact a negation that there was an effective or operative contrary intent. See also Pet. App. 4 fn. 5, 17-18.

2. A violation having been found, the Commission has "wide discretion" in its "choice of a remedy 'deemed adequate to cope with the unlawful practices' disclosed by the record. * * * It is not limited to prohibiting 'the illegal practice in the precise form' existing in the past * * * [and] may fashion its relief to restrain 'other like or related unlawful acts.'" *Federal Trade Commission* v. *Mandel Bros.*, 359 U.S. 385, 392; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473.

The order of the Commission, approved below, prohibits petitioner from paying any commission, broker-

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Co. v. *Federal Trade Commission*, 96 F. 2d 687, 691-692 (C.A. 2). The statement in the *Broch case* (363 U.S. at 174) to which petitioner refers as a suggestion that a seller must have been aware of the "operative facts" (Pet. 11) carries no suggestion or implication that the seller must have been aware of the buyer's resale prices.

age, or other compensation or any allowance in lieu thereof, to any buyer, or anyone acting on behalf of a buyer or subject to his control, in connection with the petitioner's sale of citrus fruits or other food products to such buyer. The violation here was the payment of illegal brokerage to buyers. As the Ninth Circuit held, the order "does no more than prohibit the practices found to exist in this case and closely related acts, all of which are expressly prohibited by Section 2(c)." The order is "sufficiently tailored to the circumstances of this case" (Pet. App. 5-6).[4]

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[4] Petitioner's argument that the burden of operating under the order places it at a competitive disadvantage is without merit. The present case resulted from a general investigation by the Commission, pursuant to a resolution adopted March 8, 1960, and entitled, "Resolution Directing Investigation of the Payment of Brokerage or Commissions or Allowances or Discounts in Lieu Thereof by Corporations Engaged in the Sale and Shipment of Fresh Citrus Fruit." Cease and desist orders identical to the order entered here have been entered by consent in at least seventy-five such cases (Pet. App. 7, 14). Fifty such cases in which the scope and form of the orders were the same as in this case, are listed in C.C.H. Trade Reg. Rep. (Tran. Binder, 11th ed.) ¶¶ 15,181, 15,185 and 15,492. In any event, this order properly entered against violations of the Act is not subject to attack on the ground that competitors were not subjected to it. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 413.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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